In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 989

PAUL F. PERATI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 352 F.2d 788.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1965. The petition for a writ of certiorari was filed on February 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Department of the Interior and Related Agencies Appropriation Act, 1962 (75 Stat. 246, 249) and the Act of August 1, 1888, as amended, (40 U.S.C. 257) authorized the condemnation of petitioners' lands within the boundaries of Yosemite National Park.

STATUTES INVOLVED

The relevant portion of the Act of June 25, 1948, 62 Stat. 869, 986, 40 U.S.C. 257, provides:

> That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this Act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The relevant portion of the Department of the Interior and Related Agencies Appropriation Act, 1962, 75 Stat. 246, 249, provides:

> NATIONAL PARK SERVICE
>
> MANAGEMENT AND PROTECTION
>
> For expenses necessary for the management and protection of the areas and facilities admin-

istered by the National Park Service, including protection of lands in process of condemnation; and for plans, investigations, and studies of the recreational resources (exclusive of preparation of detail plans and working drawings) and archeological values in river basins of the United States (except the Missouri River Basin); $21,786,500.

* * * *

CONSTRUCTION

For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of buildings, utilities, or other facilities or equipment damaged or destroyed by fire, flood, or storm, or the construction of projects deferred by reason of the use of funds for such purposes; the acquisition of water rights; and not to exceed $5,350,000 for the acquisition of lands, interest therein, improvements, and related personal property; $34,476,000, to remain available until expended.

STATEMENT

In May, 1962, the United States condemned the fee title to 114 parcels of land, which included Parcels 85 and 87 owned by petitioners, for use in connection with the administration, protection and development of the Yosemite National Park by the National Park Service, Department of the Interior.[1] A declaration

[1] Although within the boundaries of the Park, petitioners' lands were not Park land because, prior to the creation of the Park, homestead entry had been made by a predecessor in interest of petitioners and a homestead grant had followed. The statute creating the Park provided that such existing claims would not be affected. Act of October 1, 1890, 26 Stat. 650, 16 U.S.C. 471c.

of taking was filed with the complaint. The parties stipulated that the highest and best use of the two parcels was for "mountain cabin sites."

Petitioners' answer (R. 23), which challenged the authority to take, was stricken (R. 30-32). By agreement of the parties, the issue of just compensation was decided by the district court, which awarded $450 for each parcel (R. 37, 39-40). The court of appeals affirmed, holding that the taking was authorized (Pet. App. A).

ARGUMENT

The court of appeals correctly determined that Section 1 of the Act of August 1, 1888 (25 Stat. 357), as amended by Section 6 of the Act of June 25, 1948 (62 Stat. 869, 986, 40 U.S.C. 257), and the Department of the Interior and Related Agencies Appropriation Act, 1962 (75 Stat. 246, 249), authorized the taking of the parcels involved. The 1888 Act, as amended, provides that whenever a government officer is "authorized to procure real estate" he may acquire it by condemnation. The 1961 Act appropriated $21,786,500 "for the management and protection of the areas and facilities administered by the National Park Service," explicitly including "$5,350,000 for the acquisition of lands, interest therein, improvements, and related personal property * * *."

Statutory authorization to procure real estate may thus be evidenced through an appropriation act. It is settled, moreover, that, as recited in the 1888 Act, as amended, the government's power to condemn is co-

extensive with its power to purchase. *United States ex rel T.V.A.* v. *Welch*, 327 U.S. 546, 554; *Hanson Co.* v. *United States*, 261 U.S. 581, 587; *United States* v. *Kennedy*, 278 F.2d 121, 127 (C.A. 9). An appropriation act and the 1888 Act, as amended, have, therefore, in many previous cases, provided the basis for condemnation. *Polson Logging Co.* v. *United States*, 160 F.2d 712, 714 (C.A. 9); *United States* v. *Kennedy*, 278 F.2d 121, 122-127 (C.A. 9); *United States* v. *Threlkeld*, 72 F.2d 464, 465-466 (C.A. 10), certiorari denied, 293 U.S. 620; *United States* v. *Certain Real Estate, Etc.*, 217 F.2d 920, 925 (C.A. 6).

While Yosemite National Park is not named in the 1961 Appropriation Act, there is nothing in that Act or in other statutes relied on as authorizing the taking to indicate a congressional purpose to exclude acquisitions within that particular Park.[2] Indeed, Congress was expressly advised in the committee hearings on the bill (H.R. 6345) which became the Appropriation Act that 250 acres within the Yosemite National Park would be acquired with available funds and that 75 acres were to be acquired with funds requested.

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[2] Petitioners' assertion that the Government never even pleaded that the lands involved were within the exterior boundaries of the Park and their request that a remand be granted for a boundary determination are without merit (Pet. 12-13). The Secretary of the Interior, in the declaration of taking, determined that "[t]hese lands, situated within the boundaries of the Yosemite National Park, California, are needed for the proper administration, preservation, and development of that area for the benefit and enjoyment of the people" (R. 18). The condemnation complaint, moreover, described the lands involved with particularity (R. 5-8).

Hearings, Subcommittee of the House Committee on Appropriations, H.R. 6345, 87th Cong., 1st Sess. (1961) pp. 337-338, 1410; Hearings, Subcommittee of the Senate Committee on Appropriations, H.R. 6345, 87th Cong., 1st Sess. (1961) p. 433.

The fact that petitioners hold homestead claims (Pet. 4, 13) does not require a different result. The provision of the 1890 statute creating Yosemite Park, providing that existing homestead claims would not be affected (Act of October 1, 1890, 26 Stat. 650, 651, 16 U.S.C. 471c), clearly did not disable Congress from subsequently authorizing the acquisition of such homestead rights by purchase or condemnation. See *United States* v. *Kennedy*, 278 F.2d 121, 127 (C.A. 9). As the legislative history shows, Congress in fact understood its 1961 authorization as extending to the acquisition of such privately owned homestead claims remaining within the National Parks. See Hearings, Subcommittee of the House Committee on Appropriations, *supra*, pp. 1400-1401; Hearings, Subcommittee of the Senate Committee on Appropriations, *supra*, pp. 431-433.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 209542 637